Bourne's Transportation, Inc. *and* Anthony R. Direnzo. Case 1-CA-16244

June 1, 1981

DECISION AND ORDER

On August 15, 1980, Administrative Law Judge George F. McInerny issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel submitted a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Bourne's Transportation, Inc., Brockton, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, except the attached notice is substituted for that of the Administrative Law Judge.

[1] Respondent excepts to the Administrative Law Judge's refusal to consider its brief, contending that it requested an extension of time and submitted its brief within the time requested. In fact, Respondent's request for an extension of time is dated April 7, 1980, almost 2 weeks after the briefs were due, and there is no indication that such request was served on the parties. In these circumstances, Respondent's request was untimely and the Administrative Law Judge properly refused to consider its brief.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] In its exceptions Respondent appears to contend, *inter alia*, that as set forth in its brief to the Administrative Law Judge the Board should defer under *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), to the decision of an arbitration panel which heard the Charging Party's grievance of his termination pursuant to the collective-bargaining agreement between Respondent and Teamsters Local 653. The deferral issue was raised by Respondent for the first time in its brief to the Administrative Law Judge. There is no affirmative plea in Respondent's answer that the Board should defer, and although the subject of the grievance proceedings was broached at the hearing Respondent at no time requested deferral or even mentioned *Spielberg*. In fact, the record reveals that Respondent's only stated purpose for eliciting testimony about the grievance was to attempt to show the Charging Party's "feelings" toward Respondent and the importance of this feeling "as far as any money award" the Board may make. In these circumstances, we find that Respondent's request for deferral is untimely. See *James W. Whitfield, d/b/a Cutten Supermarket*, 220 NLRB 507 (1975); *MacDonald Engineering Co.*, 202 NLRB 748 (1973); *Conval-Ohio, Inc.*, 202 NLRB 85 (1973).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge or suspend employees for engaging in protected concerted activities.

WE WILL NOT restrain, coerce, or interfere with our employees in the exercise of their rights guaranteed by the National Labor Relations Act, as amended.

WE WILL remove any warnings or references to the incident of June 15, 1979, from the files of Anthony R. Direnzo, and WE WILL make him whole for any losses he may have suffered on account of our discrimination against him, with interest.

BOURNE'S TRANSPORTATION, INC.

DECISION

STATEMENT OF THE CASE

GEORGE F. MCINERNY, Administrative Law Judge: Based upon a charge filed on June 20, 1979, and amended on July 24, 1979, by Anthony R. Direnzo, an individual, the Regional Director for Region 1 of the National Labor Relations Board issued a complaint on August 1, 1979, alleging that Bourne's Transportation, Inc., herein referred to as Respondent, discharged Anthony R. Direnzo on June 15, 1979, and thereafter refused to reinstate him unconditionally, in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, herein referred to as the Act. Respondent duly filed an answer denying the commission of any unfair labor practices.

Pursuant to an order of the said Regional Director, a hearing was held before me on February 26, 1980, at which time all parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. Following the close of the hearing a brief was received from the General Counsel[1] which has been carefully considered.

Upon the entire record in this case, including my observation of the witnesses, and their demeanor, I make the following:

[1] The time for filing of briefs was set for March 26, 1980. There were no requests for any extensions of time for such filing, but under date of May 16, 1980, counsel for Respondent forwarded a brief to the Division of Judges. I consider this delay of almost 2 months to be untimely and I have not considered that brief.

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Massachusetts corporation which at all times material herein has maintained its principal office and place of business in Brockton, Massachusetts, where it is engaged in local and interstate trucking operations. Respondent annually receives revenues in excess of $50,000 for services performed for employers engaged in interstate commerce, and annually purchased materials and supplies valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE DISCHARGE OF DIRENZO

The facts in this case are not seriously in dispute. Anthony R. Direnzo had been employed by Respondent as a driver-dockman since December 1972. On June 14, 1979,[2] he was told by another employee, Carleton Hicks, that a certain trailer which was in Respondent's yard and was being used by Respondent had no registration certificate in it.[3] Direnzo was assigned to haul that trailer on June 14. Acting on what he had been told by Hicks, Direnzo checked the trailer and found no registration. He then went into the office and told this to Leon S. Kendrick, Respondent's general manager, who also was acting as a dispatcher. Kendrick told Direnzo not to worry about it and to go ahead and do his work.

Direnzo proceeded to take the trailer from Respondent's terminal in Brockton to Beverly, Massachusetts. While in Beverly, and before he proceeded to his appointed destination, Direnzo stopped and visited a local office of the Massachusetts Registry of Motor Vehicles.[4] There he spoke with Malcolm Andrews, an inspector with the agency, inquiring about the status of the trailer. Andrews showed Direnzo a copy of Massachusetts General Laws, chapter 90, section 11, which provides, in pertinent part, that:

> Every person operating a motor vehicle shall have the certificate of registration for the vehicle and for the trailer, if any, and his license to operate, upon his person or in the vehicle, in some easily accessible place.

According to Andrews, who was subpenaed and testified in this hearing, he told Direnzo that this law applied to the individual operation, and that he could be cited and fined, possibly effecting the registration fees on his own vehicle.[5] Direnzo then went on to make a pickup in Beverly, then called his dispatcher, Bobby Bourne. He told Bourne that the trailer had no registration and that he had been stopped by the Registry.[6] He then proceeded to finish his run. On his return to the terminal he went in and told Kendrick that he had been stopped by the Registry of Motor Vehicles in Beverly, that the trailer did not have a registration certificate, and that he could not take it out unless one was produced. Kendrick replied that Direnzo was not going to tell him what to do, that he would tell Direnzo what to do. They then went on to discuss a personal day which Direnzo had requested.

On June 15, Direnzo reported at 1 p.m. He was assigned the same trailer. He went out to it, again checked it over, and, finding no registration, went back into the office and asked Kendrick for the registration. The latter told him that his work was out on the dock and to go there. Direnzo then said he would do the work that had to be performed at the terminal, but that he could not take that trailer out on the road.

At this point there is some conflict between the testimony of Direnzo and Kendrick. Direnzo stated that Kendrick reached his hand through the window and took Direnzo's assignment sheet. Direnzo asked what that meant, and, receiving no answer, then asked if he was fired. Kendrick then said, "yes." Kendrick, on direct examination, said that Direnzo put down his papers, headed for the door, then returned and asked if he was fired. Kendrick then said that by refusing the assignment it was a "sign of a voluntary quit." On cross-examination, however, Kendrick was less sure of his own statement, finally saying that what he had said to Direnzo, in response to the question as to whether he was fired was "Take it whatever way you want." In view of this confusion, and because, as I have noted, Direnzo's testimony was corroborated in other respects by the testimony of Andrews and Hicks, I credit Direnzo's version of this incident, and find that he was, in fact, fired on June 15.

Respondent's employees are represented by Local 653, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and there is evidence that this Union, and Richard H. Lally, executive secretary of the Employers Group of Motor Freight Carriers, Inc., attempted to work out a solution to this situation in the days immediately following Direnzo's discharge. It is clear, however, that any offers of reinstatement were conditioned on Direnzo's accepting what assignments were given him, including, presumably, hauling the trailer without a registration certificate. This was unacceptable to Direnzo, and the matter then was taken up under the grievance procedure in the collective-bargaining agreement between Respondent and the Union to the New England Joint Area Committee. This committee ruled on July 11, 1979, that Direnzo be given a 30-day suspension, and that a "final warning letter" be

[2] All dates herein are in 1979 unless otherwise specified.

[3] There was some evidence that this trailer had been abandoned in Respondent's yard during a severe snowstorm in February 1978. A registration certificate placed in evidence by Respondent shows that a registration was applied for in the State of Maine on May 2, 1978, by another company.

[4] There was some intimation that this stop was off Direnzo's route, but that fact is not established in this record.

[5] Because of insurance "merit" ratings resulting in higher premiums, Andrews did not, however, issue any citation to Direnzo at that time.

[6] Direnzo testified that he lied to Bourne because he feared harassment by Respondent. The record is devoid of any evidence that would warrant such a conclusion, but Direnzo's story is corroborated by Andrews, Hicks, and, to some extent, Kendrick. Thus I do not discredit Direnzo's testimony.

issued to him.[7] Pursuant to this decision Direnzo returned to work about a month after June 15.

There is no question under these circumstances that Direnzo, in refusing to accept an assignment to drive that trailer, which was not in compliance with Massachusetts law, was engaging in protected, concerted activity. He had discussed the problem with Hicks on June 14, and had on that same day mentioned it to his steward, Bob Crowley. His stop at the Registry of Motor Vehicles office in Beverly to verify the law and the penalties which could affect him personally, although it was considered serious to the Joint Area Committee, was not known to Respondent at the time of his discharge, and was, in any event, a reasonable and prudent thing to do.

The evidence shows a concern about this trailer among Direnzo's coworkers, or at least one coworker, Hicks, and no opposition was manifested by any other employee to Direnzo's action. Further, the portion of the collective-bargaining agreement submitted in evidence provides that employees "under no circumstances" will be required to engage in any activity "in violation of any applicable statute." There is no evidence that Direnzo's action was based on malice, or designed to frustrate Respondent's business operations.

In these circumstances Respondent's action in discharging Direnzo for engaging in such protected, concerted activity, violates Section 8(a)(1) of the Act. *Varied Enterprises, Inc., d/b/a Private Carrier Personnel*, 240 NLRB 126 (1979).

Since the discharge was later converted to a suspension, that suspension is also a violation of Section 8(a)(1) of the Act.

III. THE REMEDY

Having found that Respondent has violated Section 8(a)(1) of the Act, I shall recommend that it cease and desist from its unfair labor practices and that it take certain affirmative action designed to effectuate the policies of the Act. Specifically I shall recommend that Respondent shall remove from its records all reference to the suspension of Anthony R. Direnzo, including any warnings issued on account of the incident of June 15, 1979, and that Respondent shall make Direnzo whole for the discrimiation suffered by him by the payment of backpay, together with interest thereon, for the period of his suspension, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[8]

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

2. By discharging his employee, Anthony R. Direnzo, and later converting that discharge to a suspension, Respondent has violated Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this matter, pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[9]

The Respondent, Bourne's Transportation, Inc., Brockton, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or suspending employees because they participate in protected, concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is deemed to be necessary to effectuate the policies of the Act:

(a) Remove any reference to Anthony R. Direnzo's suspension, and any warnings given or issued on account of the incident of June 15, 1979, from its records and make him whole for any loss of earnings he may have suffered by reason of his discharge and suspension, together with interest, in the manner described above in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination or copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary for determination of the amount of backpay due under the terms of this Order.

(c) Post at its place of business in Brockton, Massachusetts, copies of the attached notice marked "Appendix."[10] Copies of the notice on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representatives, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[7] There is no evidence that such a letter was actually issued, but I presume and infer that there was and is such a letter in Direnzo's file.

[8] See, generally, *Isis Plumbing & Heating Co.*, 136 NLRB 716 (1962). The General Counsel has requested that interest herein be computed at the rate of 9 percent and has submitted a supplementary brief in support thereof. The Board has rejected this contention. See, e.g., *The Bariatric Clinic*, 241 NLRB 830 (1979).

[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."